In the

Supreme Court of the United States

October Term, 1976

No. 76-717

NELSON BUNKER HUNT AND WILLIAM HERBERT HUNT,

Petitioners,

v.

PAN AMERICAN ENERGY, INC., a North Dakota corporation, MOBIL OIL CORPORATION, a New York corporation, and MELVIN ("Pat") BALLANTYNE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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The Petitioners, Nelson Bunker Hunt and William Herbert Hunt, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on August 2, 1976.

OPINION BELOW

The opinion of the Court of Appeals, Nelson Bunker Hunt and William Herbert Hunt v. Pan American Energy, Inc., Melvin ("Pat") Ballantyne and Mobil Oil Corporation,

540 F.2d 894 (8th Cir. 1976) appears in the Appendix at 75. The Memorandum of Decision and Order entered by the District Court for the District of North Dakota, Southwestern Division, dismissing Petitioners' complaint appears in the Appendix at 27.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on August 2, 1976. A timely petition for rehearing and suggested rehearing en banc was denied on August 24, 1976, Appendix at 108, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether in a tort case involving misappropriation of trade secrets, the courts below imposed upon Petitioners an improper burden of proof.

2. Whether the court of appeals erred in failing to remand the case to the trial court for new trial after finding the trial court findings clearly erroneous on two threshold issues.

STATEMENT OF THE CASE

The Petitioners, William Herbert Hunt and Nelson Bunker Hunt ("the Hunts"), both residents of Texas, commenced their action against Melvin "Pat" Ballantyne ("Ballantyne"), Pan American Energy, Inc. ("Pan Am"), and Mobil Oil Corporation ("Mobil") by filing a Complaint (Appendix at 1) in the United States District Court for the District of North Dakota on October 17, 1973. Federal court jurisdiction was predicated on 28 U.S.C. § 1332, diversity of citizenship. The Hunts' case against Ballantyne and Pan Am was premised on the tort of misappropriation of trade secrets (i.e. Hunt information regarding the location and quantity of coal deposits). The case against Mobil was based upon the fact that it had purchased coal leases from Pan Am with knowledge that the Hunts claimed an interest in these leases. Petitioners prayed for the court to

declare that Mobil held the coal leases acquired from Pan Am in trust for the Hunts and, in the alternative for damages of $5,000,000 against Ballantyne and Pan Am for the misappropriation of trade secrets.

Ballantyne and Pan Am denied that they had misappropriated any Hunt trade secrets. Mobil denied Ballantyne or Pan Am had misappropriated any of the Hunts' trade secrets, and alleged that Mobil was a bona fide purchaser and was entitled to retain coal leases purchased from Pan Am.

The trial court severed the issue of liability from the issue of damages and trial to the court, the Honorable Paul Benson, chief judge, presiding, on the issue of liability commenced on March 10, 1975. On August 18, 1975, the Court filed its Memorandum of Decision and Order that judgment be entered for the dismissal of the action. Judgment was entered dismissing the Plaintiffs' action. On September 16, 1975, the Hunts filed a Notice of Appeal to the United States Court of Appeals for the Eighth Circuit from the trial court's Memorandum of Decision and Order and the Order Dismissing Petitioners' action.

In 1971, the Hunts began an active program to explore for coal deposits in North Dakota whereby Hunt geologists drilled and electronically logged thousands of drill holes. From the information furnished by the logs, maps were prepared delineating coal bearing formations believed to contain commercial quantities of coal. The mapped areas, which were constantly updated, were known as "buy" or "target" areas. The holes were drilled by contract drillers and logged by Hunt personnel. The person logging a hole assigned each hole a code number, consisting of an alpha-numeric designation, noted the location of the hole by legal description and by alpha-numeric notation on a map, described the samples from the hole, electronically logged the hole, cleared up the debris around the hole, and destroyed the pattern of the samples taken. The loggers then delivered the original log of the holes, with the alpha-

numeric code numbers and locations on them, to Hunt geologists for delivery to Dallas. The Hunts' landmen were sent to North Dakota to purchase coal leases in or near the buy areas.

The Hunt geologists active in the North Dakota coal exploratory program at all material times were Mark Reishus and D. A. Zimmerman. These geologists interpreted the logs and outlined the potential coal deposits on area maps. Duplicates of these maps were kept in the Williston office of Hunt Oil Company.

During the Hunts' coal exploration program, Todd Ballantyne ("Todd"), a son of Respondent Ballantyne, was employed in North Dakota from October through December, 1972, as a logger for Petitioners. In October, 1972, Ballantyne secretly embarked on his own coal leasing program under the name Pan American Energy, Inc. of Denver, Colorado, not recording the leases taken until February, 1973, sometime after Todd left the Hunts' employ.

While employed by the Hunts, Todd had access to all of their geological information and buy area maps, copies of which were kept in the Hunts' Williston office (Appendix at 85 [8th Circuit Opinion]). Todd admitted making and taking copies of the Hunts' logs, without permission. These were given to Ballantyne. In the Summer of 1973, while attempting to sell his leases to Mobil, Ballantyne furnished Mobil over 100 logs with locations noted which were identical to the ones drilled by the Hunts. A list of these locations was also furnished to Atlantic Richfield Corporation as part of Ballantyne's attempt to sell his leases.

In February of 1973, Hunt landmen reported that there was heavy competition from Pan Am for leases in many of the Hunts' "target areas." Landmen also became aware of rumors that Pan Am, a new North Dakota corporation, was receiving confidential information belonging to the Hunts. The Hunts undertook an investigation to determine

whether their confidential information was being disseminated to Pan Am. In September, 1973, after investigation, the Hunts learned that Mobil was contemplating the purchase of Pan Am's coal leases. A Hunt representative contacted Mobil and was informed that Ballantyne had furnished Mobil with geological information relative to his leases. Neither Ballantyne nor Pan Am, however, employed any geologists (Appendix at 78 [8th Circuit Opinion]) or had done any geological exploratory work. Mobil knew this. Hunt representatives requested Mobil's permission to inspect the suspect information furnished to it by Ballantyne. Mobil, without retaining any copies, returned to Ballantyne all of the information which he had furnished. Mobil then proceeded with the purchase of the leases.

Two months before trial, the Hunts learned that Mobil had in its possession a map upon which a contract geologist who worked for Mobil had plotted over 100 of the logs furnished to Mobil by Ballantyne and later taken back. Almost all of the locations plotted matched holes drilled by the Hunts. In addition, the geologist assigned to the locations indicated on the map hole numbers taken from the face of the logs furnished by Ballantyne. Some of the numbers matched the numbers given by the Hunts' geologists to the logs in the field. The others matched numbers of logs sent back to North Dakota from Dallas for coring purposes. Almost all of these holes were drilled and logged during the period of Todd's employment by the Hunts.

REASON FOR GRANTING THE WRIT

The courts below have reached a result, even on the basis of their own findings, so grotesque and so contrary to the jurisprudence of North Dakota, federal courts, and tort law generally, as to justify the supervisory intervention of this Court. In spite of the holdings by *both* courts below that:

(1) A confidential relationship with the Petitioners was breached;

(2) The Defendants, Ballantyne and Pan Am, had confidential information of Petitioners (the Court of Appeals having found more of such information than the trial court);

(3) Pan Am and its principals purchased leases in or near the areas to which such confidential information is pertinent;

(4) Pan Am delivered the wrongfully acquired information to others to whom it sought to sell the leases; and

(5) The Ballantynes, principals of Pan Am, are of questionable integrity and not worthy of belief;

the courts below dismissed this action for misappropriation of trade secrets.

This result, absurd on the face of it, was apparently caused by:

(1) A significant departure from the process mandated by the *Erie* Doctrine;

(2) The imposition of a burden of proof so difficult (if not impossible) to meet that it amounts to a deprivation of due process; and

(3) An apparent failure by the Court of Appeals to recognize that its failure to remand the case for new trial, after finding the trial court "clearly erroneous" on two material, threshold and interwoven issues, amounts to an unwarranted trial de novo in the appellate court.

The complete elimination of a remedy for a well recognized wrong in a State of these United States, not demanded or even suggested by the law of that State, as a result of the federal court opinion, demands review by this Court.

ARGUMENT AND AUTHORITIES

1. The Courts Below Applied An Improper Standard In Regard To The Burden Of Proof Which Must Be Met To Establish The Right To Damage For The Misappropriation Of Trade Secrets.

The aberrant conclusions of the courts below are a result of the imposition of a totally improper (and even impossible) burden of proof. While this case is admittedly one based upon diversity of citizenship and tried under North Dakota law, it cannot be treated simply as one in which the peculiarities of a particular state's law lead to an odd result. The conclusions of the courts below as to the burden of proof were not only *not* demanded by existing North Dakota law, but they are contrary to the standards imposed by every other federal and state court in the United States which has had occasion to litigate a similar set of facts. Accordingly, the standard of proof is a fundamental legal error which demands this Court's attention.

The gravamen of the Hunts' cause of action is the misappropriation of their confidential information by Ballantyne and Pan Am. The Hunts prayed for the imposition of a constructive trust upon the leases which were purchased by defendants after they had acquired the Hunts' confidential information. In the alternative, the Hunts requested damages in the amount of $5,000,000. (Appendix at 4 [Complaint]). The trial court bifurcated the trial of the issue of liability from the determination of a proper remedy.

The courts below imposed an improper burden upon the Hunts by requiring them to prove their cause of action for damages by the same "clear and convincing" standard required to justify the imposition of a constructive trust. The trial court specifically stated that the burden he placed upon the Hunts required them to prove their cause of action by "more than a preponderance of the evidence." (Appendix at 36 [trial court opinion]).

The courts below were guided in structuring an evidentiary standard by a North Dakota statute, NDCC 59-01-06, and cases decided thereunder. These authorities suggest the imposition of a "clear and convincing" burden of proof in a case seeking declaration of a constructive trust. *These authorities are totally irrelevant to the process of ascertaining a plaintiff's burden in a tort action for damages.*

There is no North Dakota precedent for the proposition that a plaintiff who seeks damages in a misappropriation of trade secrets case must prove his case by "clear and convincing" evidence. Thus, the courts below were "writing on a clean slate." They have left North Dakota law in a most confused state because of their refusal to act in accordance with well-settled *Erie* principles. As one federal district court has stated:

> Under *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 * * *, the right to recover in the cause of action for unfair competition depends on the law of Wisconsin. There is a dearth of Wisconsin cases involving liability for misappropriation of trade secrets. *However, the rules to be applied are the application of well-settled principles of tort law and we have been guided by the Restatement of the law of Torts * * * as well as decisions from other jurisdictions.* (emphasis added).

Solo Cup Co. v. Paper Machinery Corp., 240 F. Supp. 126 (E.D. Wisc. 1965). Similarly, the courts below should have been guided by the substantive tort law of North Dakota. They should have applied "well-settled principles of tort law" and they should have been influenced by well-reasoned "decisions from other jurisdictions." Nothing could be more of an anathema to well-settled principles of tort law than forcing a plaintiff to prove the elements of his claim for the misappropriation of confidential information by "clear and convincing" evidence instead of by a preponderance of the evidence.

The North Dakota law being unsettled and the trial court's determination being contrary to general tort law, the

Eighth Circuit should not have been bound by it: "We accept the view of the trial court upon doubtful questions with respect to the law of its state *unless convinced that its determination is based upon a clear misconception or misapplication of local law.*" (emphasis added). *Venn v. Goedert*, 319 F. 2d 812, 814 (8th Cir. 1963).

Petitioners should have been required to prove the existence of the elements of the tort of misappropriation of trade secrets and their entitlement to damages by a "preponderance of the evidence," 12 BUSINESS ORGANIZATIONS, MILGRIM, TRADE SECRETS § 7.07(1) at 7-46 (Matthew Bender 1976) and cases cited therein. (Appendix at 14 [Trial Brief]).

No other misappropriation of trade secrets case ever decided by a United States Circuit Court of Appeals has imposed upon a plaintiff the obligation to prove the elements of the tort and his right to damages by a standard more onerous than by a preponderance of the evidence. In *Conmar Products Corp. v. Universal Slide Fastener*, 172 F. 2d 150, 157 (2d Cir. 1949) the plaintiff alleged that the defendant had induced the plaintiff's employees to divulge trade secrets. Judge Learned Hand declared that "the plaintiff had the burden of showing that the *balance* was in its favor * * *" (emphasis added). The Court of Claims has stated, "Plaintiff, of course, has the burden of establishing, *by a preponderance of the evidence* without resort to presumptions of any kind, that he in fact was the owner of a trade secret and just what that trade secret was." *Frodge v. United States*, 180 U.S.P.Q. 583, 587 (Ct. Cl. 1974) (emphasis added). The courts of New York have applied similar standards by which the misappropriation of trade secrets must be proved. *Minnesota Mining & Manufacturing Co. v. Technical Tape Corp.*, 23 Misc. 2d 671, 192 N.Y.S. 2d 102, 112 (Sup. Ct. 1959) involved an action brought by one tape manufacturer against another for damages and injunctive relief for the defendant's misappropriation and use of the plaintiff's processing technique where the defendant al-

legedly induced the plaintiff's former employee to breach his contract by divulging trade secrets. The court wrote,

> In order to meet the burden cast upon it, it was necessary for the plaintiff to establish *by a fair preponderance of the credible evidence* that the particular trade secrets which it claimed it possessed were trade secrets in contemplation of law and that the same were misappropriated by the defendants. (emphasis added).

In *Dutch Cookie Machine Co. v. Vande Vrede*, 289 Mich. 272, 286 N.W. 612 (1930), a case involving the misappropriation of secret recipes by a former franchisee, the court required the plaintiff to establish his right to an injunction by "preponderating evidence." The burden of proof under which the Hunts were required to labor cannot be more onerous merely because they sought damages rather than an injunction. Neither can the standard of proof be more stringent simply because the Hunts prayed for the establishment of a constructive trust as an alternative remedy.

Having imposed a burden of proof impossible for any plaintiff in a case of this sort to meet (the wrongful action being necessarily secretive), the courts below apparently felt no need to carefully formulate the issues. They did not, in fact, ever define or address the true issues in this cause.

E. W. Bliss Company v. Struthers-Dunn, Inc. 408 F. 2d 1108 (8th Cir. 1969) defined the ultimate issues in a case of this sort as follows:

> The essential element of a cause of action for appropriation of a trade secret are (1) existence of a trade secret, (2) acquisition of the secret as a result of a confidential relationship, and (3) unauthorized use of the secret. 408 F. 2d at 1112.

That case also defined a "trade secret" as being "any * * * compilation of information which is used in one's business and which gives him an opportunity to obtain an advantage over competitors who do not know or use it." 408 F. 2d at 1112. The second element stated in *Bliss* has been broadened to include any improper acquisition of the information, whether as a result of the breach of a confidential relationship or otherwise. *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, (1975). Each of these elements was established at trial by a preponderance of the evidence and by the admissions of the defendants. The Hunts' case is more compelling than *Kewanee Oil* because a confidential relationship was breached by Todd.

The courts below rely heavily in their opinions on the fact that persons could have observed the Hunt drillers and loggers as they worked in the field. If this fact is of any significance whatsoever it is for its implication that the information which resulted from the Hunt exploration in North Dakota was not "secret." Both courts specifically found that confidential Hunt information was actually in Ballantyne's possession. Therefore, the courts, without considering the point, inadvertently held that North Dakota does not adhere to the doctrine of "relative secrecy." This doctrine instructs that information need not be absolutely secret to be entitled to protection from misappropriation. The Court of Appeals for the Ninth Circuit has recently held that,

> No more is required than that the information possess a qualified secrecy * * * [and] whether such a degree of secrecy existed in a particular case is a question of fact. It is not negated because defendant by an expenditure of effort might have collected the same information from sources available to the public."

Clark v. Bunker, 453 F. 2d 1006, 1009-1010 (9th Cir. 1972). Other circuit courts have found that other states would apply this doctrine as an integral part of the law of mis-

appropriation of trade secrets. In *K-2 Ski Co. v. Head Ski Co.*, 506 F. 2d 471, 473-4, (9th Cir. 1974), the court noted that

> There are two common law doctrines on secrecy: (1) absolute secrecy and (2) relative secrecy. The better view, and the one we think both Washington and Maryland would espouse, is the majority view of relative secrecy which has been adopted by the Restatement of Torts § 757.

The Court of Appeals for the Eighth Circuit should not be allowed to place its imprimatur upon a decision which determines North Dakota law without addressing this and other fundamental questions.

Further, the opinions in this case to date indicate that the plaintiff in a case such as that now under consideration must prove by clear and convincing evidence that the defendant has not only appropriated the trade secret, but has *used it intelligently*. (Appendix at 94-95, 105 [8th Cir. Opinion]) This not only established an impossible and erroneous burden of proof, but also leads to a mistaken conclusion. This view is contrary to the general law in the field of unfair competition and to business morality. "[T]he Plaintiff need not prove that the defendant used the secret in precisely the identical form in which it was disclosed to him. In this context, the 'doctrine of equivalents' applies to trade secrets as well as to patents." 2 CALMANN, THE LAW OF UNFAIR COMPETITION TRADEMARKS AND MONOPOLIES § 58.1 at 480 (3d Ed. 1968).

The courts below erred in holding that the Hunts' entire case failed because it had not been proven by the clear and convincing standard. The clear and convincing standard may be applicable to that part of the Hunts' case which seeks the imposition of a constructive trust upon the leases held by Pan Am and Mobil, though, in light of the dearth of North Dakota cases in point, even that is questionable. But Petitioners also alleged, and the record indicates that

they sufficiently proved, that they have been damaged by defendants' commission of the tort of misappropriation of trade secrets. For this tort the usual civil evidentiary standard of proof by a preponderance of the evidence should apply. The lower courts' opinions in the instant case stand for the proposition that a plaintiff suing for damages in the State of North Dakota who alleges the misappropriation of trade secrets must prove his case by the same evidentiary standard he might be required to meet if he sought to impose a constructive trust on the items which are the subject of the suit. This is clearly error. No North Dakota case has held that the burden of proof on a plaintiff seeking to recover damages in a tort case requires more than proof by a preponderance of the evidence.

The case at bar stands for the erroneous proposition that in North Dakota, a plaintiff in a suit for damages based upon the tort of misappropriation of trade secrets must prove, by clear and convincing evidence, that:

1. the defendant used wrongfully acquired information in an intelligent manner, and
2. what specific information was used to acquire what specific property, and
3. the defendant could not have acquired the information which he misappropriated in any other way.

This is a proposition contrary to the law in every other state and American jurisprudence . It should not be imposed upon North Dakota by the Court of Appeals for the Eighth Circuit.

A writ of certiorari should issue to that Court.

2. The Court Of Appeals Found The Trial Court Clearly Erroneous On Two Threshold Issues Of Petitioners' Case And Should Have Remanded The Case For New Trial In Light Of Such Correct Findings.

An appellate court does not try a case de novo. The Court of Appeals erred in doing so in this case. The Hunts' case was premised on the tort of misappropriation of their

trade secrets by Pan Am and Ballantyne. Much of the evidence in the Hunts' favor was circumstantial. Some was direct. The trial court made a determination that Todd did not have access to Hunts' logs and buy area maps. The court also found that Mobil's contract geologist did not have the Hunts' logs before him at the time he compiled the map from information furnished to Mobil by Ballantyne. Thereafter, the trial court took a myopic view of each piece of evidence, requiring that each element of Petitioners' cause of action be proved by the clear and convincing standard. The court failed to impose liability.

The Court of Appeals found the trial court clearly erroneous in its conclusion that Todd had only minimal opportunity to acquire Hunts' buy area maps (Appendix at 85). As to the trial court's finding that Abshire did not have Hunts' logs, the circuit court stated "Abshire must have been recording that information [well numbers] from Hunt logs." (Appendix at 103). The Court of Appeals affirmed although it found the trial court clearly erroneous on two material and threshold issues. These erroneous findings by the trial court affected its subsequent findings. The trial court believed that Ballantyne and Pan Am had no opportunity to obtain the Hunts' secret information which they were accused of misappropriating. This conclusion gave added weight to any other evidence which could have been interpreted to mean that Ballantyne and Pan Am did not have or use such secrets. Ballantyne admitted having Hunt secret information. The trial court, had it made the correct findings, may have viewed the other issues and, indeed, the entire case differently. If the trial court had found, in the first instance, as the Court of Appeals later found, that Todd did have access to confidential information, the weight given to the other evidence might very well have changed accordingly. The weight to be given all of the evidence is for the trial court. For the circuit court to affirm in light of these findings is for the court to try the case de novo on appeal.

It is the proper practice to remand a cause for hearing upon a specific issue or issues. However, when the issues

are so interwoven or where justice so requires, the whole case should be remanded for a new trial. *Gasoline Products Co. v. Champlain Refining Co.*, 283 U.S. 494 (1931). *City of St. Louis v. Western Union Telegraph Company*, 148 U.S. 380 (1983). In *Gasoline Products Co.*, this Court stated,

> Here the question of damages on the counterclaim is so interwoven with that of liability that the former can not be submitted to the jury independently of the latter without confusion and uncertainty which would amount to a denial of a fair trial.

283 U.S. at 497. This is a common sense rule which should apply in every case. Here, the issue of liability is so interwoven with that of the existence of Todd's access, the import of the Abshire map, and Ballantyne's possession of Hunt secret information, that to affirm this case is likewise a denial to the Hunts of a fair trial. The Court of Appeals has sanctioned a decision of the trial court made upon clearly erroneous findings of interwoven and threshold issues of Petitioners' case. Under such circumstances, this case should have been remanded to the trial court for new trial.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit. The opinion should be vacated, and this cause remanded to the trial court for new trial.

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